71-1652

IN THE

Supreme Court of the United States

JUN 20 1972

MICHAEL RODAK, JR.,

October Term, 1972

No. .....

IRVING SARNOFF, KENNETH W. ROTTGER, and RAPHAEL KONIGSBERG,

Petitioners,

vs.

JOHN B. CONNALLY, Secretary of the Treasury, and DOROTHY B. ELSTON, Treasurer of the United States,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners, Irving Sarnoff, Kenneth W. Rottger, and Raphael Konigsberg, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 27, 1972.

Opinions Below.

The opinion of the court below is officially reported at 457 F. 2d 809. It is given in full in the Appendix, *infra*, beginning at page 1 thereof.

The Order of the District Court, Civil No. 71-1324-WPG, was entered on October 28, 1971. It appears not to be officially reported. It is set out in the Appendix, *infra*, beginning at page 3 thereof.

Jurisdiction.

The judgment of the Court of Appeals was entered on March 27, 1972. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

Question Presented.

The question presented is whether Congress has the power to assign to the President, in effect, a power granted to it alone under the Constitution, the power to declare war.

Statement.

The suit here is for injunction against disbursements under specified sections of the Foreign Assistance Act of 1961, as Amended, on the ground of invalidity of the said sections under the Constitution of the United States. Petitioners also filed application for a three-judge court. On motion of respondents, the District Court denied both the injunction and the three-judge court. The Court of Appeals affirmed.

The sections of the Foreign Assistance Act specified were 506, 610, and 614(a) (22 U.S.C. §§ 2318, 2360, 2364(a)). [R. 2.] The said sections, among others, provide funds which the President can use to furnish foreign military assistance. They contain no specification of country or countries, terms or conditions. The specified sections are shown in the Appendix, beginning at page 5 thereof, under the heading of "Statutes Involved", in their setting in the United States Code, as they read in 1970 and 1971. They are continuing provisions, with minor variations, chiefly in amounts, from year to year.

The complaint also alleged the actual use and intended use of the funds disbursed under said sections:—

the initiation, promotion, direction, control, and support of, and participation in, actual military actions in foreign areas, to the extent of making them, in effect and in fact, actions of the United States. The complaint then alleged that the said sections were invalid, especially 22 U.S.C. §2364(a), for the reason that "they constitute an assignment to the President of the power to declare war, reserved to the Congress alone by Article I, Section 8, of the Constitution of the United States; and they constitute such an assignment without restraint of any kind, . . . and without determinable definition or specification of any kind, . . .".

REASONS FOR GRANTING THE WRIT.

The statutory provisions above named are, in the view of the petitioners, in direct conflict with the limitation indicated by this court upon the power of Congress to delegate power. Congress cannot delegate power to the executive where in the delegation there is "an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States,* 321 U.S. 414, 426, 64 S. Ct. 660, 668.

Such assignments by the Congress to the President of powers given it alone under the Constitution wind down the democracy of this nation. As a result of such assignments the President takes over functions of the Congress, here that of declaring war. By force of the very same trend he can take over functions of the courts as well.

It is no answer, as the opinion below attempts, to treat war as merely "foreign affairs." Even more so, it is no answer then to say, as the opinion below does,

that the conduct of "foreign affairs" is within the exclusive province of "Congress *and* the Executive" [italics supplied]. Even still more, it is no answer to speak of the assignment by Congress to the President, by way of blanket military assistance appropriations, of the power in effect to declare war, as "congressional cooperation." It is also no answer to sweep the entire issue under the rug as "political".

We submit that there is no issue before this court or any other court at the present time more important than the preservation, under the Constitution, of the power of Congress. If the will of Congress is not expressed, how can this court know, as the doctrine indicated by it in *Yakus, supra,* would require, "whether the will of Congress has been obeyed".

Conclusion.

Because of the conflict with the decision of this court cited above, and above all the historic importance of the issue presented, we urge that this proceeding be accepted for review.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioners.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Irving Sarnoff, Kenneth W. Rottger, and Raphael Konigsberg, Plaintiffs-Appellants, vs. John B. Connally, Secretary of the Treasury, Dorothy A. Elston, Treasurer of the United States, Defendants-Appellees. No. 71-3049.

[March 27, 1972].

Appeal from the United States District Court for the Central District of California.

Before: HAMLEY, BROWNING, and WRIGHT, Circuit Judges

PER CURIAM:

Appellants seek a judicial determination that the military assistance and foreign aid provisions of the Foreign Assistance Act of 1961, as amended, specifically 22 U.S.C. §§ 2318, 2360, and 2364, are an invalid delegation to the Executive of power to wage war without a congressional declaration of war, because of the disbursement of funds under these sections for military purposes in Southeast Asia.

The conduct of foreign affairs is within the exclusive province of Congress and the Executive. Whether a plaintiff challenges the selective service system or the foreign aid and appropriations aspects of congressional

cooperation in the present conflict, he presents a political question which we decline to adjudicate. *See Da Costa v. Laird*, 448 F.2d 1368 (2d Cir. 1971); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, ... U.S. ..... (1971); *Simmons v. United States*, 406 F.2d 456, 460 (5th Cir. 1969), *cert. denied*, 395 U.S. 982 (1969); *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 945 (1967).

Dismissal of the complaint is affirmed.

Order (1) Denying Application for Three-Judge Court, and (2) Dismissing Action.

United States District Court, Central District of California.

Irving Sarnoff, Kenneth W. Rottger and Raphael Konigsberg, Plaintiffs, v. John B. Connally, Secretary of the Treasury, and Dorothy A. Elston, Treasurer of the United States, Defendants. Civil No. 71-1324-WPG.

The above-entitled matter came on regularly for hearing on defendants' Motion to Dismiss and plaintiffs' Application to convene a Three-Judge Court before the Honorable William P. Gray on October 18, 1971, the plaintiffs appearing through their attorney George T. Altman, and the defendants appearing through their counsel, Robert L. Meyer, United States Attorney, Frederick M. Brosio, Jr., Assistant U. S. Attorney, Chief, Civil Division and Carolyn M. Reynolds, Assistant U. S. Attorney, by Carolyn M. Reynolds and the court having considered the pleadings filed herein, the memoranda filed by each party and the oral argument at the time of the hearing, and the Court finding that the issues raised in the Complaint embrace a political matter between the executive and legislative branches of the government that this court has no jurisdiction to determine, WHEREFORE,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs' application to convene a Three-Judge Court be and the same is hereby denied upon the

ground that the Complaint does not contain a justiciable issue; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants' Motion to Dismiss be and the same is hereby granted upon the ground that the Court lacks jurisdiction of the subject matter of this action.

10/28/71.

/s/ WILLIAM P. GRAY
United States District Judge

Statutes Involved (Shown in Their Setting in the United States Code).

Title 22
Foreign Relations and Intercourse

* * *

Chapter 32
International Development, Peace and Security

* * *

Subchapter II
Military Assistance and Sales

* * *

Part II
Military Assistance

* * *

§ *2318. Special authority; orders for defense articles and services; limitation; notice to Congress; obligations in anticipation of reimbursements; authorization of appropriations*

(a) During the fiscal year 1970 and the fiscal year 1971, the President may, if he determines it to be vital to the security of the United States, order defense articles from the stocks of the Department of Defense and defense services for the purposes of this subchapter, subject to subsequent reimbursement therefor from subsequent appropriations available for military assistance. The value of such orders under this subsection in each of the fiscal years 1970 and 1971 shall not exceed $300,000,000. Prompt notice of action taken under this subsection shall be given to the Committees on Foreign Relations, Appropriations, and Armed Services of the Senate and the Speaker of the House of Representatives.

(b) The Department of Defense is authorized to incur, in applicable appropriations, obligations in anticipation of reimbursements in amounts equivalent to the value of such orders under subsection (a) of this section. Appropriations to the President of such sums as may be necessary to reimburse the applicable appropriation, fund, or account for such orders are authorized.

* * *

Subchapter III
General and Administrative Provisions

* * *

§ *2360. Transfer of funds between accounts*

(a) Whenever the President determines it to be necessary for the purposes of this chapter, not to exceed 10 per centum of the funds made available for any provision of this chapter (except funds made available pursuant to section 2191 to 2200a of this title) may be transferred to, and consolidated with, the funds made available for any other provision of this chapter, and may be used for any of the purposes for which such funds may be used, except that the total in the provision for the benefit of which the transfer is made shall not be increased by more than 20 per centum of the amount of funds made available for such provision.

* * *

§ *2364. Special authorities—Use of funds and furnishing of assistance upon determination that authorization is important to security of United States*

(a) The President may authorize in each fiscal year the use of funds made available for use under this chapter and the furnishing of assistance under section 2318 of this title in a total amount not to exceed $250,-

000,000 and the use of not to exceed $100,000,000 of foreign currencies accruing under this chapter or any other law, *without regard to the requirements of this chapter, any law relating to receipts and credits accruing to the United States, any Act appropriating funds for use under this chapter, or the Mutual Defense Assistance Control Act of 1951, in furtherance of any of the purposes of such acts* [Italics supplied], when the President determines that such authorization is important to the security of the United States. Not more than $50,000,000 of the funds available under this subsection may be allocated to any one country in any fiscal year. *The limitation contained in the preceding sentence shall not apply to any country which is a victim of active Communist or Communist-supported aggression.* [Italics supplied].

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1652

IRVING SARNOFF, ET AL., PETITIONERS

v.

JOHN B. CONNALLY, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners, federal taxpayers, brought an action in the United States District Court for the Central District of California challenging the validity of the military assistance and foreign aid provisions of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2318, 2360, 2364, on the ground that the provisions constitute an unlawful delegation to the President of Congress' power to declare war under Article I, Sec-

tion 8 of the Constitution. The district court denied petitioners' application to convene a three-judge district court and dismissed the complaint on the ground that it lacked subject matter jurisdiction (Pet. App. 3-4). The court of appeals affirmed (Pet. App. 1-2).

Petitioners' suit is another attempt to challenge the legality of American participation in the hostilities in Vietnam on the ground that such participation was not properly authorized by Congress. Our memorandum in opposition in *Perkins* v. *Laird*, No. 71-790, certiorari denied, 405 U.S. 965, fully discusses the issue and is equally applicable to this case. For the reasons stated therein, and in our brief in opposition (pp. 17-42) in *Massachusetts* v. *Laird*, No. 42, Orignal, October Term 1970, motion for leave to file bill of complaint denied, 400 U.S. 886,[1] the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

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[1] We are providing petitioners' counsel with copies of our memorandum in *Perkins* v. *Laird* and our brief in opposition in *Massachusetts* v. *Laird*.

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PETITIONERS' REPLY.

GEORGE T. ALTMAN,
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PETITIONERS' REPLY.

Respondents' memorandum in opposition presents, by way of their like memorandum in *Massachusetts v. Laird,* Oct. Term, 1970, (No. 42 Original, Motion for Leave to File Complaint, Motion denied, ... U.S. .....), a lengthy argument none of which has anything to do with the case here. While respondents therein falsely and absurdly label the war in Vietnam American "participation" in the hostilities there, petitioners seek no injunction against that war.

If such were their purpose, they would present as a contention the sharp conflict between *Jackson v. North American Assurance Society of Virginia, Inc.* (Va. S. Ct., 9/1/71) 183 S. E. 2d 160, 40 L. W. 2125, and

this Court's denial of the motion in *Massachusetts v. Laird, supra.* In the *Jackson* case the court held that the Gulf of Tonkin Resolution, P.L. 88-408, 78 Stat. 384, did not authorize or establish a state of war, whereas in the brief of respondents in *Massachusetts v. Laird, supra,* and in several of the circuit court cases relied on therein, such as *Orlando v. Laird* (C.A. 2, 1971) 443 F. 2d 1039, 1041, that resolution was pointed to as at least substantial Congressional support for that war.

But that conflict of cases is irrelevant. The injunction which petitioners seek is not against the war itself but solely against disbursement of funds under three specified sections of the Foreign Assistance Act of 1961. Petitioners' first contention in that respect is that the sections specified, and especially section 614(a), being 22 U.S.C. §2364(a), amount to an assignment by Congress to the President, of the power of Congress to declare war, without restraint of any kind, and without determinable definition or specification of any kind. This respondents fail to deny. Petitioners' next contention is that, under a rule in respect thereto established by this Court, as shown in the petition herein, at p. 3, Congress has no power to make such an assignment. This respondents also fail to deny.

Nor do respondents question the historic importance of the issue presented. For that reason, above all else, we urge this Court to accept this proceeding for review.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioners.